IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 32 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KISHORE NARANJIBHAI KHANIYA - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :

MR.H.N.JOSHI, FOR M/S.THAKKAR ASSOC. for Appellant,

MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/05/2007

ORAL JUDGMENT

The present appeal is preferred against the judgment and order of conviction and sentence passed by the learned Special Judge, Jamnagar in Special Criminal Case No.4 of 1997, on 24th November, 1998, whereby the present appellant-accused was convicted for violation of condition 3 of the Gujarat Essential Commodities (Distribution, Licensing, Control and Stock Declaration) Order, 1981 and Gujarat Essential Commodities (Licencing, Control and Stock Declaration) Order, 1981 read with Sections 3 and 7 of the Essential Commodities Act, 1955. The accused was sentenced to undergo three months simple imprisonment and sentenced to pay a fine of Rs.500/-, in default thereof to undergo ten days simple imprisonment.

2. The case of the prosecution is that on 11/6/1990 the present appellant-accused was found selling blue colour kerosene with his handcart to one rickshaw driver. However, upon inquiry made by the Mamlatdar the appellant-accused had denied to have any licence for selling blue colour kerosene. The appellant-accused was having 35 liters of kerosene

and two liters of kerosene had been sold to rickshaw driver. Statement of the appellant-accused was recorded on the spot. The stock of 35 liters of kerosene and handcart was detained and papers were prepared in this regard and a report was sent to the Collector, Jamnagar who in turn directed the Deputy Mamlatdar, (Stock) Jamnagar to file a complaint against the appellant-accused.

3. The prosecution has examined the Deputy Mamlatdar of the Civil Supply Department. The accused was caught on the spot while he was selling kerosene to one rickshaw driver with stock of 35 liters of blue colour kerosene which is generally meant for distribution to the public at large through the fair price shops and authorized licence holder. According to the prosecution, the accused was not having any licence and stock found with him was more than 18.5 liters. So, it is not possible even to infer that the kerosene found from the accused was the stock purchased by him for his personal consumption. The usage of kerosene for driving the rickshaw is itself an offence and it emerges that the Civil Supply Officer has also recommended that the

rickshaw driver should also be prosecuted for violating one of the Control Order issued for regulating the usage of kerosene. Undisputedly, there is nothing on record to show that the rickshaw driver was prosecuted but it appears that rickshaw driver was not prosecuted, but he was examined as Prosecution Witness No.2, Noormamad Kamalbhai at Exh.8. Of course, this witness has not identified the appellant-accused as the person from whom he had purchased the kerosene but rest of the facts stated by him clearly indicates that he was caught by the Deputy Mamlatdar when he was purchasing kerosene from one handcartvala and the person from whom he had purchased the kerosene was taken to the Office of the Mamlatdar and his statement was recorded and he put his thumb impression. Panchnama was also prepared as to the seizure of the kerosene found from the accused.

4. According to learned A.P.P., Mr.Desai, the reasons assigned by the learned trial Judge holding the accused guilty are sound and based on proved facts.

5. On the other hand during the course of hearing learned Counsel, Mr.Joshi has fairly accepted that considering the type and adequacy of the offence on record, he may not press the appeal so far as conviction part is concerned and in this regard he has also received such instructions from the appellant-accused. But the say of Mr.Joshi is that learned trial Judge ought to have granted benefit of Probation to the accused and the learned trial Judge has not applied his mind on this aspect. There is some force in argument of Mr.Joshi whereby he has submitted that otherwise the learned trial Judge ought to have discussed this aspect in the evidence before imposing substantive sentence to the accused. At one place i.e., in the final report submitted under Section 173 of the Code of Criminal Procedure, the age of the accused is shown to be of 22 years. On the other hand the say of Mr.Joshi is that on the date of offence, the accused was 18 years and not more than 19 years. The age shown in the final report submitted under Section 173 of the Code is not supported by one important vital document i.e., slip that is being prepared by the Police at the time of arrest of accused by the Police, popularly known as

"*chehra nishan patrak*-accused identification slip". The age of the accused at two other places are shown as 19 and 20 years. Even, in the Summary Form, the age of the accused is shown as 27 years. The plea of the accused was recorded on 4/4/1998 and the incident is of 11/6/1991. So, the age of the accused must be around 20 years. In the complaint the Deputy Mamlatdar (Stock), Jamnagar, Mr.C.J.Parmar has not mentioned the age of the accused. The accused has been designated as hawker by prosecution and that too in the Panchnama at Exh.16. The Panchnama was drawn by the Mamlatdar, Jamnagar City. Seizure order was also passed. One crucial document Exh.19 i.e., statement of the accused was recorded by the Mamlatdar reveals that he was a teenager and his age is shown 18 years. So, there is enough force in argument of Mr.Joshi that accused was below 21 years of age and was entitled to benefit of Probation of Offenders Act.

6. It is settled that while giving benefit under Section 6 of the Probation of Offenders Act, 1958, it is not always necessary to called for the report if the Court is otherwise satisfied from the

circumstance and it is possible for the Court to give benefit of Section 6 of the Probation of Offenders Act. The alleged offence cannot be said to be heinous or otherwise grave in nature.

7. Mr.Joshi has placed reliance on judgment of the Hon'ble Apex Court in case of **Harivallabha and Another Vs. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330**. He has submitted that in this cited decision the Apex Court has given benefit of Section 360 read with Section 361 of Criminal Procedure Code to the accused who was held guilty of offence punishable under Section 7 of the Essential Commodities Act, 1955.

8. This Court after referring the decision in case of (**The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787** and the decision in case of **Jatan Singh Vs. State of Rajasthan, reported in 1995 (3) Crimes 773** has given the benefit of probation to the accused under Section 360 read with Section 361 of the Code of Criminal Procedure.

9. After referring the decision of the Supreme Court, in case of **Harivallabha and Another (Supra)** in subsequent decision this Court has granted benefit of Section 360 read with Section 361 of the Code of Criminal Procedure and in one Criminal Appeal No.60 of 1995 of MUNAFBHAI MOHMAD ARIF VOHRA Vs. STATE OF GUJARAT, decided on 15/02/2007, this Court has also granted benefit of probation under Section 4 of the Probation of Offenders Act read with Section 361 of the Code of Criminal Procedure. Where there is no statutory bar the trial Court ought to have applied its mind that whether this is a case wherein accused can be given the benefit of probation under Section 6 of the Probation of Offenders Act read with Section 361 of the Code of Criminal Procedure..

10. Here, in the present case the appellant-accused is a hawker and of about 18 to 20 years at the time of commission of offence. After necessary inquiry the Court had initiated criminal prosecution after about seven years and conviction came to be recorded in the year 1998, meaning thereby after

about eight years. Now, we are in the year 2007. Whether, it would be proper for the Court to send the appellant in jail when he had committed offence when he was aged below 21 years, is the crucial question. The report of Probation Officer, if called for, it would give the recent picture and not the situation prevailing on the date of offence or the period round about.

11. Learned A.P.P., Mr.Desai has submitted that the Court may confirm the order of conviction and sentence of fine while giving the benefit of Probation under Section 6 of the Probation of Offenders Act read with Section 361 of the Code of Criminal Procedure and appeal can be decided accordingly.

12. Having considered the totality and in view of the discussion made herein above, the present appeal is partly allowed. While confirming the judgment and order of conviction and sentence of fine, passed by the learned Special Judge, Jamnagar in Special Criminal Case No.4 of 1997, on 24th November, 1998, the order of sentence is hereby

altered.

12.1 The appellant-accused is given benefit of probation under Section 6 of the Probation of Offenders Act, 1958 read with Section 361 of the Criminal Procedure Code, 1973. The appellant-accused is directed to execute a bond of Rs.5,000/- (Rupees Five Thousand Only) for good conduct with one surety of the like amount for a period of one year under the scheme of Section 6 of Probation of Offenders Act, 1958 read with Section 361 of Criminal Procedure Code, 1973. The appellant-accused shall execute the bond of good conduct before the concerned trial Court within a period of 30 (thirty) days from the date of receipt of the copy of this writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and appellant will be liable to serve the sentence imposed upon him by the trial Court. The order of substantive sentence shall remain under suspension till the period of bond of good conduct i.e. for one year and shall become inoperative on completion of the period.

12.2 The appellant-accused is also directed that

in case of violation of any of the conditions of the bond of good conduct, the trial Court shall at liberty to issue warrant of arrest of the appellant-accused for serving the sentence imposed by the concerned trial Court.

12.3 The Bail Bond executed by the appellant-accused shall stand discharged on the date on which the appellant-accused executes the bond of good conduct before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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